

Internal Revenue Service  
**memorandum**

CC:TL-N-7757-89

Br4:KAAqui

date: AUG 1 1989

to: District Counsel, St. Paul CC:STP

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED]  
Request For Tax Litigation Advice.

By memorandum dated June 1, 1989, you forwarded a request from Chief, Examination Division, St. Paul District, for advice concerning claims for refund filed by former and present employees of the above-referenced taxpayer which have been held in suspense pending resolution of the appeal of Thompson v. Commissioner, 89 T.C. 632 (1987). For the reasons stated below, we conclude that the Service should continue to hold these claims in suspense.

ISSUE

Whether the Service should follow administratively the holding of the Tax Court that liquidated damages awarded in Equal Pay Act cases are excludible from gross income under section 104(a)(2) of the Code as damages received on account of personal injuries. 0104-0300

FACTS

Dorothy Thompson was the lead plaintiff in a successful class action suit brought by female bindery workers against the Government Printing Office asserting sex discrimination claims under the Equal Pay Act, 29 U.S.C. § 206(d) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Thompson v. Boyle, 499 F. Supp. 1147 (D. D.C. 1979), aff'd in part and rem'd in part sub nom, Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982). Pursuant to this judgment, taxpayer, in 1982, received back pay and liquidated damages but reported as income only the back pay portion of the award. The Service determined that both portions of the award were includible and issued a statutory notice of deficiency. In redetermination proceedings, taxpayer asserted that the entire award was excludible as damages received on account of personal injury.

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In Thompson v. Commissioner, 89 T.C. 632 (1987), the Tax Court held that the liquidated damages portion of the award was excludible under section 104(a)(2) as damages received on account of personal injuries. In concluding that sex discrimination is a personal injury, the court relied on its previous decisions in Bent v. Commissioner, 87 T.C. 236 (1986), aff'd, 835 F.2d 67 (3d Cir. 1987) and Metzger v. Commissioner, 88 T.C. 834 (1987), aff'd without published opinion, No. 87-1428 (3d Cir.1988). The court also relied upon a statement in Davis v. Passman, 442 U.S. 228 (1979), that the right to be free from gender discrimination is a personal right. 442 U.S. at 235 n.10.

Both parties appealed the decision of the Tax Court to the Fourth Circuit which rejected the arguments and affirmed the decision for substantially the same reasons stated below. Thompson v. Commissioner, 866 F.2d 709 (4th Cir. 1989). In addition, the Fourth Circuit found support in Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), where the Court stated that liquidated damages serves as "compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." Id at 707.

By letter dated March 8, 1989, we recommended to the Justice Department that a petition for a writ of certiorari not be filed because of the absence of a conflict between the Circuits on this issue. On April 4, 1989, the Solicitor General decided that no such petition would be filed by the Government. The time for filing such a petition expired on May 3, 1989, and the decision of the Tax Court is now final.

The claims for refund that have been suspended arise from litigation under the Equal Pay Act. [REDACTED], where the appellate court affirmed the findings of the district court that the class of female plaintiffs were entitled to back pay and liquidated damages. The adverse decision in Thompson prompted substantial claims for refund of taxes paid on liquidated damages by members of the [REDACTED] class action suit. These claims had been placed in suspense pending resolution of the Thompson appeals.

In Rickel v. Commissioner, 92 T.C. No. 32 (1989), the Tax Court extended its Thompson holding to liquidated damages under the Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 621 et. seq. The court concluded that liquidated damages awarded thereunder are on account of personal injuries notwithstanding our argument that Congress intended them to be punitive in nature. Transworld Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). The court found that in the hands of the recipient, liquidated damages awarded under the ADEA are compensatory in

nature and cited Thompson for its conclusion that these damages are excludible under section 104(a)(2).

On June 19, 1989, taxpayers filed a notice of appeal to the Third Circuit in Rickel. Without knowledge that such an appeal had been filed, on June 22, 1989, representatives of the Tax Litigation Division and of the Assistant Chief Counsel (Income Tax & Accounting) met to discuss Service position in Thompson and Rickel. It was agreed that publication of acquiescence in Thompson would undercut arguing in Rickel that even if these damages are not punitive in nature, respondent should nevertheless prevail on the theory that liquidated damages awarded under the ADEA do not serve a compensatory purpose as under the Fair Labor Standards Act and are merely additional income taxable under section 61 of the Code. It was also suggested that maintaining all Equal Pay Act refund claims in suspense would be appropriate in light of the Rickel appeal. 1/

The Fourth Circuit's opinion in Thompson follows the recent appellate trend of generally rejecting the government's arguments in section 104(a)(2) cases, see Threlkeld v. Commissioner, 848 F.2d 81 (6th Cir. 1988); Bent v. Commissioner, 835 F.2d 67 (3d Cir. 1987); Metzger v. Commissioner, 88 T.C. 834 (1987), aff'd without published opinion, No. 87-1428 (3d Cir. 1988), and we are not optimistic of any greater success. 2/ In non tax cases, courts which have addressed the nature of liquidated damages under the Equal Pay Act have concluded uniformly that such damages are compensatory in nature. See e.g. Marshall v. Brunner, 668 F.2d 748, 753 (3d Cir. 1982); [REDACTED]; E.E.O.C. v. First Citizens Bank of Billings, 758 F.2d 397 (9th Cir. 1985), cert. denied, 474 U.S. 902 (1986). Although, the terms "compensatory" and "compensation" have been used to described such damages, the courts gave no indication as to the nature of the wrong for which the employee was compensated. It is not unlikely that other courts might follow the Tax Court in holding that "[e]xclusion under section 104 will be appropriate if compensatory damages are received on account of any invasion of the rights that an individual is granted by virtue of being a

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1/ Forwarded herewith is a memorandum dated July 14, 1989, from Assistant Chief Counsel (Income Tax and Accounting) in which it was recommended that an appeal be filed and prosecuted in Rickel.

2/ But see Sparrow v. Commissioner, T.C. Memo. 1989-315 where the Tax Court agreed with the Commissioner that federal employees' claims under Title VII are for wages only.

person in the sight of the law." In any event, Thompson is the only case involving the Equal Pay Act which has been decided on appeal and we believe that it would be premature to follow this decision at this time. Thus, we do not believe that administrative concession of the issue is appropriate at this time.


In view of the above, we recommend that all claims for refund of taxes paid on liquidated damages awarded under the Equal Pay Act be held in suspense pending resolution of the Rickel appeal.

If you have any questions or need additional information, please contact Mr. Keith A. Aqui at FTS 566-3308.

MARLENE GROSS

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By:

  
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Attachment:

Memo dtd July 14, 1989